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CPLR 5240: Protecting the Abused Judgment Debtor

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to the judgment debtor the judgment will be executed. When the third party is a corporation with which the debtor is a building superintendent, may service upon the corporation be effectuated by service upon the debtor as its agent?

This issue was resolved in the negative in *St. Francis Hospital v. Tudor Apartments.*[141] The Supreme Court, Orange County, stated therein that the execution should have been served upon "an executive officer, or some agent of the corporation whose duties are of sufficient importance to make it reasonably probable that process will be brought to the attention of the corporation."[142] Service upon a judgment debtor in his alleged capacity as agent of a corporation was understandably characterized as imprudent.[143]

CPLR 5240: Protecting the abused judgment debtor.

In deciding the foreclosure proceedings of *Dime Savings Bank of New York v. Barnes,*[144] the Supreme Court, Nassau County, has again utilized CPLR 5240 in an effort to minimize judicial abuse.[145] It is within the purview of 5240 that the court may at any time, upon a motion or on its own initiative, make any order regarding any enforcement proceeding of the CPLR. The court may deny, limit, condition, regulate, extend or modify the use of any enforcement proceeding found therein.[146]

In *Barnes,* plaintiff-bank had properly declared the defendant-mortgagor in default and accordingly was granted summary judgment of foreclosure. However, mindful of defendant's attempts to make the mortgage account current and of the age and ill health of defendant's mother, with whom defendant lived, the court determined this case to be "a proper case for the exercise of the court's discretion, in the interest of justice, as provided in CPLR 5240. . . ."[147] In so finding, the court stayed the enforcement of its judgment upon the express condition that the defendant pay the entire arrearages due the plaintiff

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141 67 Misc. 2d 803, 325 N.Y.S.2d 599 (Sup. Ct. Orange County 1971).

142 *Id.* at 804, 325 N.Y.S.2d at 600, *citing* 9 CARMODY-WAIT 2d § 64:253 (1966).

143 67 Misc. 2d at 804, 325 N.Y.S.2d at 600.

144 67 Misc. 2d 837, 325 N.Y.S.2d 365 (Sup. Ct. Nassau County 1971) (mem.).

145 In Lee v. Community Capital Corp., 67 Misc. 2d 699, 324 N.Y.S.2d 583 (Sup. Ct. Nassau County 1971), *discussed in The Quarterly Survey,* 46 ST. JOHN'S L. REV. —, — (1972), this same court utilized CPLR 5240 in order to invalidate an execution sale where, had the sale been allowed, the debtor's equity of $20,000 would have been lost for failure to pay only a few hundred dollars.

146 *E.g.,* Gilchrist v. Commercial Credit Corp., 66 Misc. 2d 791, 322 N.Y.S.2d 200 (Sup. Ct. Nassau County 1971), *discussed in The Quarterly Survey,* 46 ST. JOHN'S L. REV. 355, 378 (1971). *See* 6 WK&M 5240.02.

147 67 Misc. 2d at —, 325 N.Y.S.2d at 368.

on the mortgage, and further, that the account not lapse into more than one month's arrears at any future date. Failure by defendant to satisfy these requirements would allow the plaintiff to have the mortgaged premises sold as per the judgment granted in foreclosure.

As evidenced by this decision,[148] CPLR 5240 is a valuable safeguard against judicial injustices. Attorneys should not hesitate to request its application, and judges should not refrain to use it as the broad source of authority it is intended to be.[149]

ARTICLE 55 — APPEALS GENERALLY

CPLR 5519(a)(1): Stay protects the state from punishment for contempt.

Pursuant to CPLR 5519(a)(1), the state, its political subdivisions, and its officers and agencies are accorded an automatic stay in any enforcement proceeding once a notice of appeal is served upon the adverse party.[150] Such service is complete under CPLR 2103(b)(2) the moment it is mailed.

Accordingly, the Supreme Court, Nassau County, held in *Byrne v. Long Island State Park Commission*,[151] that the state and the attorney general were not guilty of contempt because state officials prevented peaceful picketing in contravention of an injunction order.[152] Thirty minutes after service of a copy of this order, the state mailed a notice of appeal to the plaintiff, thereby effectively staying the injunction, although the notice was not received until several days later.[153] Concluding that the stay foreclosed punishment for the state's activity during this interim,[154] the court denied the defendant's request to renew the application upon proper papers.[155]

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148 *Accord*, Lee v. Community Capital Corp., 67 Misc. 2d 699, 324 N.Y.S.2d 583 (Sup. Ct. Nassau County 1971).

149 *See* 7B MCKINNEY'S CPLR 5236, supp. commentary at 155 (1970).

150 *See* 7 WK&M ¶ 5519.03.

151 67 Misc. 2d 1084, 325 N.Y.S.2d 147 (Sup. Ct. Nassau County 1971).

152 Byrne v. Long Island State Park Comm'n, 66 Misc. 2d 1070, 323 N.Y.S.2d 442 (Sup. Ct. Nassau County 1971).

153 67 Misc. 2d at 1086, 325 N.Y.S.2d at 149, *citing* Hacker v. City of New York, 25 App. Div. 2d 35, 266 N.Y.S.2d 194 (1st Dep't), *rev'd on other grounds*, 26 App. Div. 2d 400, 275 N.Y.S.2d 146 (1st Dep't 1966), *aff'd*, 20 N.Y.2d 722, 229 N.E.2d 613, 283 N.Y.S.2d 46, *cert. denied*, 390 U.S. 1036 (1967).

154 67 Misc. 2d at 1086, 325 N.Y.S.2d at 149-50. The court cited Union Free School Dist. No. 7 v. Allen, 30 App. Div. 2d 629, 290 N.Y.S.2d 669, 671 (3d Dep't 1968), where it was held that a stay was itself suspended while an appeal by the Commissioner of Education was pending.

155 Plaintiff had proceeded by notice of motion rather than by order to show cause or by warrant of attachment, as required by statute (N.Y. JUDICIARY LAW § 757 (McKinney 1968)). 67 Misc. 2d at 1085, 325 N.Y.S.2d at 148. There is disagreement as to whether this defect is jurisdictional in nature or a mere irregularity. *Compare, e.g.*, Johnson v. Ackerman, 192 App. Div. 890, 181 N.Y.S. 772 (2d Dep't 1920) *with, e.g.*, Maigille v. Leonard,